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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	**Case # 08CR1171-W**
	)	
Plaintiff	)	**MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING:**
v.	)	
	)	**PRE-TRIAL MOTIONS TO DISMISS, SUPPRESS AND COMPEL PRODUCTION**
DAVID C. JACQUOT,	)	
Defendant	)	
	)	Judge: Hon. Thomas J. Whelan
	)	Courtroom: 7
	)	Date: Sept 8, 2008
	)	Time: 2:00 pm

Now comes the Defendant, and provides the following arguments and points and authorities to support the Defendant's Motion to Suppress/Dismiss/Compel Discovery.

1. The Defendant requests that evidence in the case that is the fruit of illegal government searches and actions be suppressed. The illegal searches, and evidence derived from the same, was the starting point from which the charges against the Defendant were initiated. There was no audit of the LAWFIRM tax returns and no inquiries made to the individual(s) responsible for keeping the LAWFIRM records. It is not circumstantial that a criminal review of LAWFIRM tax returns just happened to be initiated by the same prosecutor and the same agents that were investigating LAWFIRM's clients. Even more suspect is that fact that this review only occurred after:

- The government's Temporary Restraining Order was dismissed,
- The Temporary Receivership was dismissed,
- The request for Preliminary Injunction was denied,
- The IRS's civil case was dismissed,
- The government was required to pay substantial attorney fees to the Defendants in the above actions,
- The government's false and erroneous letter to all xelan clients failed to turn up any victims, and
- Global settlements were entered into by the IRS upholding the deductibility of the alleged fraudulent programs.

The illegal activity of the government and the illegal evidence it obtained lead to the vindictive and unusual review of the LAWFIRM tax returns. The Defendant argues that the searches were illegal and the illegality is being covered-up by the prosecution's refusal to provide discovery that shed light on the illegal conduct.

The remainder of this brief will describe the violations by the government that resulted in illegal seizures, violations of Federal Rule of Procedure 16, violation of the Defendant's constitution right to exculpatory evidence, Grand Jury violations, prosecutorial misconduct and selective/vindictive prosecution.

2. Intentional and Bad Faith Violation of Federal Rule of Criminal Procedure 16

Contrary to well established law, and despite three written requests and an attempt to meet face to face regarding discovery, the government and AUSA Faith Devine are refusing to provide what is required by law. As shown in paragraph 38 and Exhibit 5 of the Statement of Facts, the Defendant attempted to narrow the scope of this dispute by providing AUSA Faith Devine with a simple chart to indicate the existence or non-existence of the disputed items and her intention to produce or not produce those items that did exist. AUSA Devine refused in writing to provide

such information. Therefore the discussion and proceedings regarding this matter may be more extensive and cumbersome than if she had simply replied. Rule 16 requires the government to provide (among other things):

2.1. **Documents and Objects, which include books, records, data within the government's possession, custody or control**. The government's "custody or control" has been broadly construed by the courts. *See* U.S. v. Santiago, 46 F.3d 885 (9th Cir. 1995); U.S. v. Bryan, 868 F.2d 1032 (9th Cir. 1989) (*Rule 16(a)(1)(C) includes out-of-district documents in the* ***possession, custody, or control of any federal agency participating in the investigation of the defendant*** *which prosecutor had knowledge of and to which prosecutor had access*). The Court has broad authority to impose sanctions for Rule 16 violations, including dismissal of the case. U.S. v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985). Specifically, Rule 16 requires that the government disclose documents or objects that:

2.1.1. **The Government intends to use at trial in its case in chief**. In regards to this issue, information disclosed is solely at the discretion of government and the Defendant simply requests that the Court find that **no** evidence other than already disclosed by the Government prior to the filing date of this Motion be admissible at trial and no testimony related to such excluded records be admissible at trial.

2.1.2. **Were obtained from or belong to the Defendant**. The government has extensive property belonging to the Defendant. As described in paragraph 16 of the Statement of Facts, in a joint agency raid, conducted pursuant to a warrant that the Defendant contends was invalid due to bad faith false affidavits and/or information illegally obtained via violation of the attorney client privilege, the government seized virtually all electronic client records and administrative records of LAWFIRM, and other written materials by LAWFIRM. Not only was this seizure pursuant to an alleged invalid warrant, these materials were taken from an attorney, over his objections, known to be working at that location for a company other than the target

of the raid. None of these materials have been returned in over three (3) years and none have been returned pursuant to discovery requests.

2.1.3. **Are material to preparing a defense** . The government case against the Defendant appears to allege that deposits do not match gross revenue reported. No audit of LAWFIRM returns , nor any interviews of persons responsible for recordkeeping of LAWFIRM occurred. This simplistic approach does not take into account inherent accounting irregularities between accrual and tax basis accounting, nor the possibility of accidental or intentional errors in tax reporting documents (such as 1099's) from third parties. During the years in question, LAWFIRM received the vast majority of its income from xelan, Inc. and affiliated companies. These companies are no longer operating and the sole source of records of these transactions is in the hands of the government, taken during the Nov 2004 raid described in paragraph 16 of the Statement of Facts. This includes electronic accounting data and the metadata that accompanies such records. To establish their case the government seized and reviewed a very large number of documents and electronic accounting records. Unlike a street crime, there is little physical evidence in a case such as this, much less a crime scene, and often there is not even a discrete event. The events and transactions that make up an entry on a tax return are often a compilation of numerous transactions over a period of a year. If the government must rely on a paper trail and computer and accounting records to establish its case, then certainly the Defendant needs access to the same to mount a defense. There is no requirement that the Defendant show that the records sought are exculpatory for the purposes of Rule 16. Another alleged false income tax return case illustrates this point. In United States v. Lloyd, 992 F.2d 348 (D.C. Cir. 1993) the government charged the defendant with aiding and abetting the preparation of false income tax returns. The defendant sought copies of previous tax returns filed by the clients who he was accused of assisting in hiding income, arguing that the clients had misled him and therefore he did not have the requisite intent to aid in the filing of false tax returns. The District of Columbia Circuit found sufficient indicia of the materiality

of the requested records under Rule 16(a)(1)(C), **even though the defendant was ignorant of their contents and could not show that they would in fact be material to the defense**. The concept of helpfulness for determining materiality refers to whether **documents *may* assist in preparing the defense**, not that the defendant demonstrate they actually provide a defense because that showing is virtually impossible without access to the records. Denying the Defendant access to this evidence is unconscionable. There is no justifiable reason for the government to deny access to these records and since they have done so, the case should be dismissed. If the case is not dismissed, the Defendant requests that the Court allow **no** evidence from such records to be admissible at trial and allow no testimony related to such excluded records to be admitted at trial at trial. This blanket exclusion is appropriate based on Federal Rule of Evidence 106, "Remainder of or Related Writings or Recorded Statements" which provides: "*When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.*"

2.1.4. **The Defendants Statements to Government Agents**. The Defendant has made countless oral and written statements to IRS agents, including IRS Criminal Investigation Agents on more than one occasion. No such statements or reports containing such statements have been disclosed.

2.1.4.1. In regards to oral statements that **do not** contain exculpatory information, disclosure is required of those statements and of documents that contain statements or summaries of statements that the government **intends to** introduce at trial. Reports summarizing interviews and memoranda containing the substance of oral statements are also within the scope of Fed. R. Crim. P. 16. See U.S. v. Johnson, 525 F.2d 999 (2d Cir.1975); *see also* U.S. v. Walk, 533 F.2d 417, 418 (9th Cir. 1975). Additionally, reports and documents

containing Defendant's statement that that the government **does not intend** to introduce at trial must also be disclosed in the 9th Circuit. U.S. v. Bailleaux, 685 F.2d 1105, 1113-14 (9th Cir. 1982). AUSA Faith Devine's assertions that all required disclosures have been in accordance with "***local practice and federal criminal law***" are false. The government has statements of the Defendant and pursuant to law these should be disclosed. The Defendant requests that the case be dismissed for this breach of duty by the government and prosecutor Faith Devine's false statement that all disclosures required by "*local practice and federal criminal law*" have been made. If dismissal is not granted, since the government has elected to release no statements, the Defendant requests that the Court find that **no** oral statements of the Defendant or any records that contain statements of the Defendant be admissible at trial and **no** testimony: (1) related to such statements,(2) by agents that collected such statements, and (3) related to records that contain such statements, be admissible at trial.

2.1.4.2. In regards to oral statements that contain exculpatory information, all such statements and all documents and recordings that contain such statements or references to such statements are required to be disclosed and failure to disclose is violation of the Defendant's constitutional rights that warrants dismissal. (See paragraph 3, below).

2.1.4.3. In regards to written statements, the Federal Rules of Criminal Procedure provide that all written statements by the Defendant must be provided. Additionally, the government must make available to the Defendant "the portion of any written record which contains the substance of any relevant oral statements of the defendant made in response to questioning by one known at the time to be a government agent." Rough notes of agent interviews are discoverable and must be preserved. U.S. v. Harris, 543 F.2d 1247, 1251-53 (9th Cir. 1976). The government has rough notes and written reports of

statements made by the Defendant. AUSA Devine is well aware of the statements the Defendant made to IRS criminal investigators and others. Even if she had "convenient" memory loss, she has a duty to exercise due diligence to ascertain whether any statements are contained in the files of the agency that conducted the investigation. U.S. v. Jensen, 608 F.2d 1349, 1357 (10th Cir. 1979). Just as a "trial court should strike the testimony of an agent who has destroyed his rough notes," Harris, 543 F.2d at 125, the Defendant urges that this Court should dismiss this action for the prosecutor's bad faith deliberate exclusion of discoverable evidence.

2.1.5. **The Defendants Prior Record.** As the government has not produced any such prior records to the Defense, the Defendant simply requests that the Court find that **no** such records be admissible at trial no testimony related to such records be admissible at trial.

2.1.6. **Scientific Tests.** Federal Rule of Criminal Procedure 16(a)(1)(D) allows discovery, upon request of counsel, of results or reports of any scientific tests or experiments and results or reports of physical or mental examinations of the Defendant within the custody or control of the government which are either: (1) material to the defense; or (2) to be used as evidence in the government's case-in-chief. The defense is entitled to samples for independent testing, U.S. v. Noel, 708 F. Supp. 177 (W.D. Tenn. 1989) and is entitled to discovery of the underlying data used in government tests to aid in cross-examination and independent testing. U.S. v. Yee, 129 F.R.D. 629, 635-36 (N.D. Ohio 1990). Based on AUSA Faith Devine's written statement on 14 August 2008 that "expert witness summaries will be provided at a reasonable time prior to a firm trial date," it appears that there may be scientific tests that are not being disclosed. Pursuant to the letter described in paragraph 38 of the Statement of Facts, the lack of a response by AUSA Devine is deemed a denial of the existence of such tests. If such reports exist and were intentionally not disclosed by AUSA Devine, the Defendant asks the Court to dismiss these charges.

Additionally, as the government has not produced any records of scientific tests, the Defendant requests that the Court find that **no** such tests be admissible at trial and that no testimony related to such tests be admissible at trial.

2.1.7. **Expert Witnesses**. The prosecutor must give notice to defense counsel of its intention to use results of scientific tests or expert witnesses with enough time for counsel to obtain an expert to assist him in attacking the findings of the government's expert. The advisory committee notes contemplate that requests and disclosures will be made in a "timely" fashion. U.S. v. VonWillie, 59 F.3d 922, n.4 (9th Cir. 1995). If the prosecutor fails to give adequate notice to the defense, the Court should either exclude the testimony of the government's expert or to grant a continuance which will allow the defense to consult with and possibly retain an expert. *See* People of Territory of Guam v. Cruz, 70 F.3d 1090, 1092 (9th Cir. 1995); U.S. v. Barrett, 703 F.2d 1076, 1081 (9th Cir. 1983). AUSA Faith Devine's written statement on 14 August 2008 that "expert witness summaries will be provided at a reasonable time prior to a firm trial date" clearly indicates that an expert witness is intended to be used. The Defendant argues that consistent with her statement, AUSA Devine may be able to provide the expert witness summaries at a later date, but that she had a discovery obligation to inform the Defendant of the identity of such witness to allow the Defendant an opportunity to prepare. The Defendant contends that the reason for AUSA Devine to withhold such information is another bad faith attempt to preclude the Defendant from being able to adequately prepare his defense and as such is a basis for dismissal of the charges. If a dismissal is not granted, the Defendant requests that the Court find that **no** expert testimony is admissible at trial.

3. **Intentional and Bad Faith Violation of the Defendant's Constitutional Rights Regarding Exculpatory Evidence.**

The government has a Constitutional duty to inform the defense of material exculpatory evidence impacting either guilt or punishment. Although the Defendant contends that the government's failure to provide exculpatory evidence is nothing more than another link in a long chain of bad faith activities, it does not matter if the violation is innocent or in bad faith. The Supreme Court has held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, **irrespective of the good faith or bad faith of the prosecution,"** Brady v. Maryland, 373 U.S. 83, 87 (1963). The Defendant contends that the following exculpatory evidence exists and was not disclosed:

3.1. **Documents and objects**. *Brady* is not merely a rule of discovery, but one of fairness. "The government cannot with its right hand say it has nothing while its left hand holds what is of value," United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) as such an action denies due process and fundamental fairness. As described in paragraph 2.1.3, above, the accounting records are crucial to the development of a defense and the failure to provide them is not only a Rule 16 violation but is also a violation of the duty to provide exculpatory evidence. AUSA Devine's refusal to disclose the accounting records of xelan, while the government itself has used the same in the development of its case is a bad faith due process violation and should be sanctioned with dismissal of the case. If the case is not dismissed, the Defendant requests that the Court allow **no** evidence from such records to admissible at trial and allow no testimony related to such excluded records to be admitted at trial. This blanket exclusion is appropriate based on Federal Rule of Evidence 106,"Remainder of or Related Writings or Recorded Statements" which provides: "*When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."*

3.2. **Prior records of government witnesses.** Based on the fact that the Federal Public Defender's office was conflicted from representing the Defendant as described in paragraph 31 of the Statement of Facts, it appears likely that a witness or informant with criminal issues exists. AUSA Faith Devine is clearly aware of such information as she stated to the Magistrate Adler that such conflict definitely exists. Such information must be provided to the defense. U.S. v. Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988). Failure to disclose any prior records of such a witness is a due process violation that should result in dismissal of the indictment. In the event the case is not dismissed, the Defendant requests the Court to allow **no** testimony by any witness that has a prior conviction to be admitted at trial.

3.3. **Impeachment Evidence of Government Witnesses.** Any evidence which would affect the credibility of a government witness should be construed as Brady material. This would include any information which shows bias of the witness, motive for the witness to lie or exaggerate testimony, and any credibility concerns of a government witness (i.e. prior bad acts of dishonesty, felony convictions). The government may not withhold impeachment evidence of government witnesses. Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998) (prosecutor failed to disclose an agreement to provide benefits to witness in exchange for testimony); See U.S. v. Bernal-Obeso, 989 F.2d 331, 336 (9th Cir. 1993) ("a material lie by a critical informant-witness about his prior record would be exculpatory and thus discoverable Brady information"); U.S. v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1992) (failure to turn over evidence that government snitch was running the investigation and manipulating the DEA constitutes Brady violation). This is even more vital if the witness is an informant. The Ninth Circuit, noting that informants are cut from "untrustworthy cloth" and that the use of informants is a "dirty business," placed an affirmative duty on "prosecutors and investigators to take all reasonable measures to safeguard the system against treachery." See Bernal-Obeso, 989 F.2d at 333-34 (9th Cir. 1993). Failure to disclose impeachment evidence of a witness is a due process violation that should result in dismissal of the indictment. In the event the

case is not dismissed, the Defendant requests the Court to allow **no** testimony by any witness with impeachment information to be admitted at trial.

3.4. **Witness Statements Favorable to the Defendant.** The Defendant believes that government agents and possibly prosecutors have interviewed witnesses that made favorable statements regarding the Defendant and his activities. Failure of the government to provide such statements is a due process violation. (Witness statements favorable to the defendant are Brady material, Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968)). Failure to disclose any witness statements favorable to the Defendant is a due process violation that should result in dismissal of the indictment.

3.5. **Affidavits for Search Warrants.** Even though no request is required for the production of exculpatory information, (see U.S. v. Bagley 473 U.S. 667, 682 (1985)), the Defendant specifically requested on two occasions and was denied copies of the affidavits for search warrants. The Defendant believes that such affidavits exist based on the 4 November 2004 search in which **his property was taken and never returned**.

3.5.1. Brady Violation. Even though he was denied a copy of the search warrant affidavits, the Defendant contends the affidavits in support of the search warrant contained erroneous and false information. These warrants were obtained and executed in coordination with the TRO/receivership/civil complaint proceeding and the supporting declarations submitted to Judge Whelan by AUSA Devine described in paragraph 15 of the Statement of Facts. It is likely that the search affidavits in the same case, at the same point in time, involving the same agents, and the same prosecutor(s) contained similar information. Since the information in these affidavits was likely similar, it follows that it is likely just as false as the information provided in the TRO receivership declarations. False and erroneous search affidavits are exculpatory and should have been disclosed. The Defendant also alleges that the investigation that lead to the search was initiated by information

obtained that was known to violate the attorney client privilege (See paragraph 3.6 below.) Therefore the Defendant contends that:

- Since a copy of such affidavits was requested and denied, all inferences should be in favor of the Defendant and that failure to provide search warrant affidavits that contain false and erroneous information is a due process violation that warrants dismissal and or suppression of any evidence obtained or derived there from.

- Since a copy of such affidavits was requested and denied, all inferences should be in favor of the Defendant and all evidence obtained by the government after receiving information from Mr. Suverkrubbe should be suppressed.

3.5.2. Lack of Probable Cause. A search or seizure that is unsupported by probable cause is unlawful. Carroll v. U.S. 267 U.S. 132, 155-56 (1925). The Defendant contends that the affidavits did **not** show probable cause because they are likely similar to the declarations for the TRO/receivership and these declarations were insufficient to support the TRO/receivership. The standard of proof for a TRO is described as "reasonable grounds." United States v. Stewart, 872 F.2d 957, 962 (10th Cir. 1989). The Defendant argues that if the information in the declarations was not sufficient for "reasonable grounds," that it is not sufficient to show "probable cause" and therefore the seizure is invalid. Evidence that is unlawfully seized is not admissible to prove a Defendant's guilt. Weeks v. U.S., 232 U.S. 383,398 (1914) Mapp v. Ohio, 367 U.S. 643, 654 (1961). This includes the "fruit" of such illegal conduct. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Wong Sun v. U.S., 371 U.S. 471, 487-88 (1963). Evidence should be suppressed when a magistrate issues a warrant on deliberately or a recklessly false affidavit. Franks v. Delaware, 438 U.S. 154, 155-56, 171-72 (1978); or an affidavit that is so "lacking in probable cause as to render official belief in its existence entirely unreasonable." Leon v. U.S., 468 U.S. 923 It is clear from the record in the TRO/receivership case overall,

but particularly in regards to the Defendant that, the declaration in the TRO was deliberately false or recklessly false (failed to disclose that a vast number of the alleged illegal payments in the amount of many millions of dollars were paid to the IRS for quarterly client tax obligations.) Additionally, it could be argued that the declaration only resulted in a finding of "sworn uncertainty" on behalf of the IRS experts, and therefore it was unreasonable to believe that it showed probable cause. All evidence seized pursuant to the search warrant and all evidence derived from the evidence seizure should be suppressed.

3.5.3. Beyond the Scope of the Warrant. Evidence seized beyond the scope of the warrant should be suppressed. U.S. v Juichang Chen 979 F.2d 714, 717-19 (9th Cir. 1992). Without being provided a copy of the warrant and supporting affidavit, it is impossible to tell if the scope of the warrant was exceeded, however, the Defendant believes that it was unlikely that the warrant provided that client records and administrative records of LAWFIRM was within the scope of the warrant. It is also unlikely that the warrant covered accounting records of xelan regarding payments to counsel for legal services rendered. Accordingly, aall evidence seized pursuant to the search warrant and all evidence derived from the evidence seizure should be suppressed

3.6. **Information Obtained in Violation of the Attorney Client Privilege.** The Defendant alleges that attorney Michael Suverkrubbe is the source of the IRS initial interest in this case. See paragraph 27 of the Statement of Facts. The Defendant alleges that Mr. Suverkrubbe, in violation of the attorney client privilege, was providing information to his friends at IRS CID about xelan being a "ponzi scheme" (as alleged in the TRO) and all kinds of other allegations that were untrue. These allegations caused the CID agents and AUSA Devine to invest a large amount of time, produce false and erroneous declarations in the TRO/Receivership/ Civil Case that were submitted to this Court, and waste years and countless taxpayer dollars on a frivolous investigation. Any information that was provided to the IRS agents by Mr. Suverkrubbe in violation of the

attorney client privilege is Brady material and failure to disclose the same is grounds for dismissal.

4. **Intentional and Bad Faith Violations of the Grand Jury Process** .

The Fifth Amendment guarantees the right to indictment in federal criminal proceedings by an unbiased jury. *See* Costello v. U.S., 350 U.S. 359, 362 (1956). The remedy for violations of the Defendant's due process rights in regards to Grand Jury violations is dismissal of the indictment. See Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988). The federal courts have found various kinds of witness examinations before the grand jury to be improper because they bias the grand jury. For example, a prosecutor may not ask a series of questions designed solely to destroy the character of the accused in the eyes of the grand jury; *see* U.S. v. Samango, 607 F.2d 877, 883 n.10 (9th Cir. 1979). In this case, it appears from the face of the indictment that the AUSA Faith Devine presented evidence to the Grand Jury about the Defendant's involvement with xelan. Based on the track record of presentation of erroneous and false xelan related evidence by AUSA Devine in the TRO / Receivership before Judge Whelan, the Defendant contends that xelan information was improperly introduced before the Grand Jury to destroy the character of the Defendant and that the case should be dismissed. Additionally, based on the massive negative publicity surrounding the xelan matters in the San Diego area, presentation of the Defendant's involvement has the capacity to destroy the Defendant's character and improperly bias the Grand Jury and the indictment should be dismissed. In the event the case is not dismissed, the Defendant requests that the Court order that the transcripts of the Grand Jury proceedings be produced and provided to the Defendant to prove that no illegal tainting of the jury occurred. Rule 6(e)(2) generally precludes discovery of grand jury transcripts, but two exceptions listed in Rule 6(e)(3)(C) provide the defense access to them: (i) when "so directed by a court" in regard to a judicial proceeding, or (ii) when "permitted by a court" because of a motion to dismiss the indictment for misconduct before the grand jury. All that is needed is a colorable claim that grand jury misconduct occurred to allow transcripts to be produced under Rule6(e)(3). See Pittsburg Plate Glass Company v. U.S., 360 U.S. 395, 400 (1959). Here there is more than enough evidence for a "colorable claim." There is history of presentation of improper and false

information in judicial proceedings by AUSA Devine and there is specific reference to the Defendant's involvement with xelan in the indictment. Even if this is not sufficient evidence for a "colorable claim," the District Courts retains discretion to order disclosure of grand jury transcripts for reasons beyond those listed under Rule 6(e)(3). Craig v. U.S., 131 F.3d 99, 102 (2d Cir. 1997); In Re Hastings, 735 F.2d 1261, 1268 (11th Cir. 1984); In Re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973). Based on the long and sordid history of government action in this case, the Court should dismiss the Indictment or at a minimum order production of the transcripts.

5. **Prosecutorial Misconduct**.

The prosecutor's duty is to seek justice. Berger v. U.S., 295 U.S. 78, 88 (1935). When a prosecutor's misconduct has violated the Defendant's due process rights, a dismissal or reversal is appropriate. Beardslee v. Woolford, 358 F.3d 560, 573 (9th Cir. 2004). The long pattern of governmental misconduct and particularly the discovery and Brady violations by AUSA Devine have violated the Defendant's due process rights and the Indictment should be dismissed.

6. **Selective/Vindictive Prosecution**.

The government has a broad discretion to investigate and bring charges, but it is **not unlimited**. The Courts should protect individuals against prosecutorial decisions that are made in bad faith. See U.S. v. Leonti, 326 F.3d 1111 (9th Cir. 2003). Vindictive behavior of a prosecutor is grounds for dismissal and the facts and circumstances of a case can give rise to a rebuttable assumption of vindictiveness. U.S. v. Goodwin, 457 U.S. 368, 373 (1982). Vindictive behavior includes take acts to penalize a defendant's valid exercise of statutory or constitutional rights. U.S. v Stokes, 124 F.3d 39, 45 (1st Cir 1997); U.S. v. Lopez, 474 F.3d 1208, 1211 (9th Cir 2007). Additionally, upon a showing of disparate treatment and improper motives, a case can be dismissed for selective prosecution. The case history shows a long-term contentious battle between the Defendant's clients and the government. Only after embarrassing defeats did the government attack the Defendant. These defeats included:

- The government's Temporary Restraining Order was dismissed,
- The Temporary Receivership was dismissed,
- The request for Preliminary Injunction was denied,
- The IRS's civil case was dismissed,
- The government was required to pay substantial attorney fees to the Defendants in the above actions,
- The government's false and erroneous letter to all xelan clients failed to turn up any victims, and
- Global settlements were entered into by the IRS upholding the deductibility of the alleged fraudulent programs.

Further the government never audited the returns of LAWFIRM nor interviewed the individual(s) responsible for record keeping. The government seems to have simply concluded that a crime has occurred because bank deposits do not match revenue on the returns. The Defendant argues that this attack is vindictive based on his exercise of statutory and constitutional rights on behalf of clients in legitimate disputes over legitimate tax law issues (issues that the government was never able to prove were improper). Further, it is selective prosecution as many other individuals in similar situations are not being prosecuted. It is unlikely that any substantial number of prosecutions have occurred with no review of the returns or interviews of the individuals involved occurred. If it were not for the long battle with xelan, the government would not have initiated a prosecution without audit or review of the returns. The tax code provides many methods of dealing with alleged errors on tax returns, with prosecution occurring only on the most egregious of cases. This is not one of those cases. For example, if the facts are as the government alleges, under the tax code, the numbers for 2002 **do not even qualify** as a substantial understatement of income that would warrant an extension of the civil audit statute of limitation from 3 years to 6 years, let alone constitute a criminal violation. The case is ripe with circumstances of vindictive behavior. Beyond those previously described in the Statement of Facts, publicity is a telling factor in the government's motivations. When the TRO/Receivership and raid occurred, the government launched a massive publicity and press release campaign and the story was carried in local and national newspapers,

televisions shows, and internet sites. This publicity even included a prepared statement by the IRS Commissioner Mark W. Everson who said:

"This is one of the biggest cases we have seen in years..."

Obviously the agents involved and AUSA Faith Devine must have really "sold" the xelan case to their superiors as a huge deal if the IRS Commissioner himself had a prepared statement waiting to be released in conjunction with the raid. After it was disclosed that the declaration was full of lies and the case was thrown out by Judge Burns, there was no publicity, apology or retraction of the previous allegations. There was no statement from IRS Commissioner Everson that this was one of the ***"biggest cases of false allegations and injustice we have seen in years"*** and an offer of his apologies for **misusing the power of this Court and abuse of citizens**. Rather there was retaliation by individuals that had been thoroughly embarrassed and wanted a "conviction" to salvage the mess and possibly their careers.

To further retaliate and damage the Defendant, on April 15, 2008, which just "happens" to be the date each year when the media is most a tune to tax issues, AUSA Devine secures the indictment in this case. Coordinated with this indictment is a press release that is issued on the same day that "David Jacquot, a tax attorney" is indicted for "filing false tax returns."

These press releases and lack of retractions are simply more evidence of bad faith.

7. **Compel Discovery .**

7.1. In the event that the Motions to Dismiss and the Motions to Suppress described herein are not granted, the Defendant moves this Court to compel the Government to provide the discovery described below. Just as the Court has the authority to sanction the government or dismiss the case for failing to provide discovery as described in paragraph 2 and 3 above, the Court also has broad authority to order production of discovery. Rule 16(d)(2) states:

"...the court may order [the violating party] to permit discovery or inspection..."

The Defendant has requested the government disclose any evidence favorable to the defendant as discussed in the accompanying Statement of Facts. The government's bad faith refusal to provide all discovery material required by Brady and the Defendant's request for dismissal or suppression is discussed in Paragraph 3 above. However, a motion to compel production of Brady material is nonetheless required in order to preserve any issues on the record. Lindsey v. King, 769 F.2d 1034, 1041 (5 Cir. 1985) ("reversal for suppression of evidence by the government is most likely where the request for it was specific.")

The Court has authority to order Brady material disclosed prior to trial. U.S. v. Starusko, 729 F.2d 256 (3rd Cir. 1984). In U.S. v. Pollack, 534 F.2d 964 (D.C. Cir. 1976), the Court held that, "Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." Id. at 973. Pre-trial disclosure of favorable material is required in this case.

A long lapse of time between the events alleged and the trial are grounds for ordering pre-trial disclosure. See U.S. v. Kosovsky, 513 F.Supp. 1 (D.C. Okl. 1981). In Kosovsky, more than five years had elapsed since the events at issue, and on that basis the Court ordered the government to produce favorable material pre-trial. See id. The events at issue in this case are alleged to have occurred more than five years ago. After the passage of so much time, pre-trial disclosure is necessary to allow the defense to prepare for trial.

The government has no valid grounds for opposing pre-trial disclosure. In the absence of a strong showing by the government why pre-trial disclosure should not be had, pre-trial disclosure is preferable to disclosure during trial. See U.S. v. Penix, 516 F.Supp. 248

(D.C. Okl. 1981). Specific, corroborated evidence of threats to the safety of witnesses is a valid ground for opposing pre-trial disclosure. See U.S. v. Higgs, 713 F.2d 39 (3rd Cir. 1983), cert. denied, 464 U.S. 1048 (District Court abused discretion by ordering pre-trial disclosure of names of witness offered immunity or leniency). No allegations of threats by the Defendant have been made in this case. The government cannot show any potential harm in this case from pre-trial disclosure. Because so much time has passed since the events at issue, and the government likely possesses significant favorable material the defense requires to effectively prepare its case, and there is no risk to the government from early disclosure, this Court should exercise its authority to order the government to produce the Brady material requested by the Defendant prior to trial.

Therefore the Defendant requests the Court to order the Government to produce the following:

7.2. The following definitions apply to production of discovery:

7.2.1. "Statement." Statement shall mean all forms of verbal and non-verbal communication, to include but not limited to, unrecorded oral communications and actions and all forms of recorded communications, to include but not limited to audio recordings, pictures, video, digital recordings, and drawings. The term Statement can also include Documents (defined below).

7.2.2. "Document." Document shall mean all forms of temporary or permanently recorded information on both tangible and intangible mediums. Document shall include all forms of written information, to include but not limited to, handwritten, typed and printed documents (hereinafter "Written"). Document shall also include all forms of electronic stored information (ESI), to include but not limited to, computer records, email, voicemail, metadata, text messages, and deleted data and data fragments. If information is in more than one format (for example hand written and typed) then the term Document means each and every format and each and every format should be produced. In the event that information is in both Written and ESI form, then Document means both Written and ESI, and both should be produced.

7.2.3. "Electronic surveillance." Electronic surveillance shall mean all forms of listening, recording, and viewing of any Statement, Document, action or inaction through either covert or non-covert means and includes but is not limited to wiretaps, recorded phone conversations, cellular phone eavesdropping, electronic mail intercepts, and all other forms of monitoring of communications.

7.3. Defendant requests that Government disclose to the Defendant and either provide copies to the Defendant or allow the Defendant to inspect, copy or photograph the below described items. If no such items exist, a statement to that effect should be provided.

7.3.1. All documents and other tangible objects containing information about the investigation and charges of the Defendant in the possession, control or custody of the government which were obtained from or belonged to David Jacquot , which were obtained from or belonged to David Jacquot, JD, LLM (Tax), PA (hereinafter "LAWFIRM"), that could be considered material to the preparation of Defendant's defense, or intended for use by the Government at any evidentiary hearing or the trial of this case. This should include, but is not limited to: All actual Forms 1099 issued to LAWFIRM for years 2000, 2001, 2002, 2003, 2004; All payments by all xelan related companies to LAWFIRM during 2000, 2001, 2002, 2003, 2004, including: electronic accounting programs and databases and all metadata related to the same, full check ledgers; audited and unaudited financial statements with supporting ledgers and work papers; All actual Forms 1099 issued to Cove Trading by all xelan related companies for 2000, 2001, 2002; Bank statements and cancelled checks of the Attorney Trust Account of David Jacquot, JD, LLM (Tax), PA for 2001, 2002, 2003, 2004; and all other xelan, LAWFIRM or Defendant financial information.

7.3.2. All material within the purview of Brady v. Maryland, 373, U.S. 83 (1963) and Giglio v. United States, 405, U.S. 150 (1972). Specifically, any material or information which tends to negate the guilt of the Defendant as to the offense(s) charged and any material or information within the government's possession or control which would tend to reduce

the Defendant's punishment for such offense(s). This should include, but is not limited to the items describe herein in paragraph 3 above.

7.3.3. All Statements of Defendant, whether before or after indictment made to employees or agents of the Government (including informants), which are relevant to investigation of the Defendant. This includes all notes and Documents made that contain or refer to the Statements of the Defendant. This shall include but is not limited to Statements to: John Weeks and Robert Scheck.

7.3.4. A written disclosure of the existence or non-existence of any evidence obtained as the result of Electronic Surveillance and if so, copies of all surveillance reports related to the investigation of the Defendant. This disclosure should describe the full extent of any Electronic Surveillance, eavesdropping, or tape recording in which Defendant had any interest and of any conversations where the Defendant was a participant in or was a recipient witness thereof. This request includes any affidavits and applications related thereto as well as copies of the recordings, transcriptions, summaries and logs thereof.

7.3.5. A written disclosure as to whether there have been any tape recordings of any Statements, admissions, confessions, or conversations involving Defendant along with a copy of said tape recordings and a copy of any transcriptions thereof.

7.3.6. A written disclosure as to the existence or non-existence of anticipated testimony by government informer(s), and if so, the identity of any informants who allegedly have information about the investigation of the Defendant, including: (a) The name of the informant; (b) The present whereabouts of the informant, and (c) any Statements and Documents related to such informant's testimony.

7.3.7. Order depositions of Michael Suverkrubbe and IRS Agent Shrek to determine the information provided by Michael Suverkrubbe to the government.

7.3.8. Provide the case files of agents involved in the investigation to determine the information provided by Michael Suverkrubbe to the government.

7.3.9. Disclose the full and complete extent of any dealings with, or promises of any inducements, made by employees/agents of the Government to any person including prospective Government witnesses or defendants in any other case, for information related to the investigation of and charges against the Defendant, including but not limited to Michael Suverkrubbe and Wendy Hickson.

7.3.10. The name(s), work address, work phone number(s) of all government employees, agents and informants involved in the investigation of the Defendant, to include, but not limited to employees and agents of: Internal Revenue Service, Postal Inspector, The Department of Homeland Security, Immigration and Naturalization, and Immigration and Customs Enforcement.

7.3.11. The conviction records (if any) of all such witnesses the Government intends to call at any evidentiary hearing or at the time of trial. If no convictions exist, a statement that verifies the same.

7.3.12. A transcript of all Grand Jury testimony and copies of all Grand Jury evidence related to the investigation of the Defendant.

7.3.13. Copies of any and all search warrants (including affidavits in support thereof and inventories listing articles seized when executing said warrant) used by the Government to obtain any information or evidence in the investigation of the Defendant.

7.3.14. All inventory(ies) listing all items seized without warrant and the location of the seizure of all items seized in the Government's investigation of the Defendant. This shall include but is not limited to: items seized from 401 West A Street, #2210, San Diego, California.

7.3.15. The prior criminal record of felonies and misdemeanors of Defendant, and a statement as to whether or not the Government intends to use the same.

7.3.16. The results of physical or mental examinations and drug or substance abuse history of employees/agents of the Government and/or informants, witnesses, indicted or unindicted co-conspirators, or cooperating defendants.

7.3.17. The results of all scientific tests or experiments on any Document, or tangible object made in connection with the investigation of the Defendant.

7.3.18. The name, business address, phone number and a written resume of the qualifications of any expert witness which the United States Attorney intends to call in the case in chief together with a statement of the substance of such expert's expected testimony.

7.3.19. All Statements and Documents that were obtained in violation of the attorney-client privilege during the investigation of the Defendant and all Statements and Documents that were obtained in violation of any other privilege recognized by law.

7.3.20. All Statements and Documents that were obtained in violation of any law or constitutional right during the investigation of the Defendant.

7.4. Provide a brief description of all Statements and Documents that are relevant to any of the requests described above that are not being produced due to a claim of privilege or protection under any law or theory. Provide a description of the law or privilege applicable to each non-disclosed item.

8. Conclusion

In summary the government embarked on an erroneous mission to attack the client's of the Defendant, likely at the urging of an attorney providing government cronies privileged information. The government presented false and erroneous declarations to this Court to obtain

invalid injunctive relief and immediately launched a massive damaging publicity campaign. After the government was handed defeat after defeat, they did not seek to retract their previous erroneous publicity statements, rather they sought to retaliate. Using evidence that they had improperly seized, they obtained an indictment from an allegedly improperly biased Grand Jury regarding errors on a tax return that had never been audited. To cover-up the chicanery and illegal actions that had previously occurred, they refused to provide discovery and exculpatory evidence to the Defendant. During this case the government has:

- Violated Federal Rule of Procedure 16
- Violated the Defendant's Constitution right to exculpatory evidence
- Violated the Defendant's due process rights
- Potentially violated Grand Jury procedures
- Engaged in prosecutorial misconduct
- Engaged in Vindictive/Selective prosecution
- Countless other bad faith activities

This is not the government system that the Defendant risked his life for during combat in Iraq. It is not the government system designed or desired by the founding fathers and it is not the government system that every American deserves. This Court should send a strong message to Attorney General's office that this behavior will not be tolerated and dismiss the charges with prejudice, suppress evidence as described herein, or compel the government to produce required discovery, Brady material, and Grand Jury transcripts.

Cases

Respectfully Submitted this 25th **day of** August 2008

David Jacquot